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IN THE SUPREME COURT OF THE UNITED STATES

Case No. 89-275

October Term, 1989

COOTER & GELL, PETITIONERS,

v.

HARTMARX CORPORATION, ET AL.,
RESPONDENTS.

BRIEF OF PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE

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On Behalf of the Plaintiff
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QUESTIONS PRESENTED

Amicus will address the following issues:

1. Whether review of Rule 11 sanctions under an "abuse of discretion" standard is appropriate for all issues; and

2. Whether a court of appeals can automatically impose Rule 11 sanctions on appeal upon affirmance of a Rule 11 award.

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BRIEF OF PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE

The Plaintiff Employment Lawyers Association (PELA) hereby submits the following Brief Amicus Curiae in this case.

STATEMENT OF INTEREST

PELA is a nonprofit organization, consisting of over 750 lawyers in forty-nine states. Its members specialize in the representation of individual employees in employment and labor matters, including cases alleging employment discrimination under one or more of the various federal and state fair employment statutes. Members of PELA also are active in litigating claims in federal and state courts in the rapidly changing area of wrongful discharge claims.

Amicus is concerned over the interpretation and application given by some courts to amended Rule 11, Fed.R.Civ.P. There is strong evidence that Rule 11 is being administered in a disproportionate manner, especially in civil rights cases. These Rule 11 fee awards have a chilling effect on the representation of persons who believe that their civil rights or other employment rights have been violated.

Two recent empirical studies support Amicus's concern. A survey of the published Rule 11 decisions found that the plaintiff was the target of the sanctions motion in 78.8% of the cases in

which sanctions were requested, and that plaintiffs were sanctioned in 59.6% of the cases in which they were the target. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988). This same study found that plaintiffs were the target of the sanctions request in 86.4% of civil rights and employment discrimination cases in which Rule 11 sanctions were requested,[1] which is somewhat higher than the 78.8% representation of plaintiffs in the overall sample. However, civil-rights and employment-discrimination plaintiffs "are sanctioned in 71.5% of the cases in which they are the target, a figure that is a full 17.3% higher than the average for plaintiffs in all other cases (54.2%)." *Id.* at 200-01.

A more recent empirical study examined both published and unpublished Rule 11 decisions in the Third Circuit. American Judicature Society, *Rule 11 in Transition: A Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (1989). This study found that, while requests for sanctions in civil rights cases occurred at only a slightly higher rate (18.2%) then would be expected on the basis of civil filings in that circuit (16%), plaintiffs and/or their counsel were sanctioned on motion in civil rights and employment discrimination cases at a rate (47.1%) that was considerably higher than the rate (8.45%) for plaintiffs in non-civil rights cases.[2] *Id.* at 69. This disparity persisted even after uncounseled *pro se* plaintiffs were excluded: counseled civil rights plaintiffs in that survey were sanctioned on motion at a rate (45.5%) far higher than the rate for counseled plaintiffs in non-civil rights cases (8.7%), "a difference that is statistically significant at a level of less that one percent." *Id.* at 71.

Rule 11 has become a major cause of concern for litigants in the area of employment and labor law. The availability of these sanctions significantly increases the financial risks faced by plaintiffs' counsel. Further, as will be explained more fully in this Brief, sanctions have been imposed on an inconsistent and sometimes arbitrary basis. The financial penalties and stigmatization

[1] That statistic does not include tax protest cases brought *pro se* or by represented parties. *Id.* at 200 n. 60.

[2] This study found that this latter disparity was statistically significant at a level of less than one percent. *Id.* at 69 n.19.

resulting from Rule 11 sanctions make employment and labor law, with its oft-shifting legal standards,[3] so risky as to cause many practitioners to decide to abandon this area of their practice. The result is that a Rule intended to deter abusive behavior is making it more difficult for persons to vindicate their rights in this important area of the law.

ARGUMENT

I. APPELLATE REVIEW OF THE MIXED LEGAL-FACTUAL QUESTION OF WHETHER A PARTY HAS MADE AN ADEQUATE PRE-FILING INQUIRY SHOULD BE REVIEWED ON APPEAL ON A *DE NOVO* BASIS.

This case involves the adequacy of the pre-filing inquiry done by counsel for the plaintiff in an antitrust class action. The import of this Court's decision in this case will extend beyond the factual setting in which it arose. This Court should be careful to articulate legal standards that are sensitive to the differences in the varying types of federal litigation. Moreover, this Court's opinion in this case also will affect decisions in state courts, given the frequency with which various states have adopted their own versions of the 1983 amendment to federal Rule 11.[4]

In order to discuss appellate review, it is necessary to understand exactly what is being reviewed. In this case, the question

[3] In its last term, this Court handed down a number of decisions in cases brought under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. §1981, changing the law articulated in prior opinions of this Court or in a number of circuit court decisions. *See, e.g., Wards Cove Packing Co., Inc v. Atonio*, ____ U.S.____, 109 S.Ct. 2105 (1989); *Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363 (1989); *Jett v. Dallas Independent School Dist.*, ____ U.S. ____, 109 S.Ct. 2702 (1989).

[4] Alaska Civ.R. 11; Ariz.R.Civ.P. 11; Ark.R.Civ.P. 11; Colo.R.Civ.P. 11; Idaho R.Civ.P. 11; Kan.Stat.Ann. §60-211 (1988); Ky.R.Civ.P. 11; Mich.Ct.R. 214(D) and (E); Minn.R.Ct. 11; Mo.R.Civ.P. 55.03; Mont.Code Ann., T. 25, ch. 20, R. 11 (1988); Nev.R.Civ.P. 11; N.C.R.Civ.P. 11; N.D.R.Civ.P. 11; 12 Okla.Stat.Ann. §2011 (1988); Ore.R.Civ.P. 11; S.D.Cod. Laws §15-6-11 (1988); Tenn.R.Civ.P. 11; Utah R.Civ.P. 11; Wash.Civ.R. 11; W.Va.R.Civ.P. 11; Wis.Civ.P.R. 802.05(1)(a).

is whether Petitioner satisfied its obligation under Rule 11 that, by signing a pleading, it certified to the best of its "knowledge, information, and belief formed after reasonable inquiry [that the pleading] is well grounded in fact..."

The Advisory Committee described the "reasonable inquiry" standard under amended Rule 11 as being one of "reasonableness under the circumstances," a standard that "is more stringent than the original good-faith formula..." Advisory Committee's Note to 1983 Amendment to Rule 11, 97 F.R.D. 165, 198-99 (1983).[5] The committee included strong cautionary language (97 F.R.D. at 199):

> The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Rule 11 should be applied with particular caution in employment cases. Evidence of discriminatory intent or other actionable motives generally is circumstantial. To prove liability, it may be necessary to present the testimony of many witnesses and introduce a large number of documents into evidence. The development of a party's case often evolves during pretrial discovery, as each party obtains more information about the plaintiff and the decision-makers, as the plaintiff learns more of the company's

[5] Before the 1983 amendment to Rule 11, that Rule stated that the signature of an attorney on a pleading constituted a certificate that the best of the attorney's "knowledge, information and belief there is good ground to support it, and that it is not interposed for delay." The new requirement of "reasonable inquiry" imposes a duty on the attorney "for some pre-filing inquiry into both the facts and the law..." Advisory Committee's Note, 97 F.R.D. at 198 (1983).

view of his or her work history, and as the parties obtain and interpret comparative data concerning other employees.

Prior to filing a lawsuit, few potential plaintiffs (except those in high-level executive positions) know all or even most of the facts necessary to establish liability. The plaintiff's attorney will be able to learn the names of potential witnesses, but will be unable to interview current supervisory employees and possibly other witnesses because of ethical constraints. DR 7-104(A)(1). Other witnesses, particularly persons still employed by the company that the attorney intends to sue, may be reluctant to cooperate out of fear of retaliation. Moreover, most of the documents necessary to establish liability generally will be in company's sole possession. *See, e.g., Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1002, 1012 (2d Cir. 1986). As a result, an attorney representing a plaintiff in an employment case often can conduct only a limited pre-filing inquiry because of the inherent difficulties of obtaining useful information without discovery.

Some courts have been sensitive to the difficulties of obtaining comprehensive information in civil rights and employment cases before a lawsuit is filed. In a police misconduct case filed under 42 U.S.C. §1983, the Second Circuit concluded that neither plaintiffs nor their attorneys need obtain, before commencing suit, "the detailed information needed to prove a pattern of supervisory misconduct in the form of inadequate training, improper policies, and toleration of unconstitutional actions by individual police officers. A plaintiff does not have to be prepared to meet a summary judgment motion as soon as the complaint is filed." *Oliveri v. Thompson*, 803 F.2d 1265, 1279 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987). *See also Morda v. Klein*, 865 F.2d 782, 785-86 (6th Cir. 1989)("It would be particularly difficult to fault plaintiffs for a lack of a prefiling inquiry when, as here, defendants have refused plaintiffs access to material information that would bear on certain allegations made in the complaint.")

Other courts have rushed to sanction plaintiffs and their attorneys, ignoring facts that established the inappropriateness of those sanctions. For example, in *Cabell v. Petty*, 810 F.2d 463 (4th Cir. 1987), the Fourth Circuit reversed the district court's decision

to deny a Rule 11 motion against the plaintiff's attorney, concluding that "counsel's statements at oral argument indicate that the action was filed in a speculative effort to find someone financially liable for plaintiff's injuries before the statute of limitations expired." *Id.* at 466. However, the majority of the appellate panel ignored the fact that the plaintiffs' attorney had to file the complaint under severe time constraints; that, at the time of filing, the attorney had reasonable grounds to believe that he could establish liability; and that the plaintiffs' attorney faced significant difficulties in uncovering the facts in that case. *Id.* at 467 (Butzner, J., dissenting).

Similarly, the Seventh Circuit reversed a district court's decision not to impose Rule 11 sanctions, reaching beyond the record to speculate that the plaintiff may have failed to conduct an adequate pre-filing inquiry or may have filed its complaint in bad faith. *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1082-83 (7th Cir. 1987). The majority opinion noted that the defendant "believes" the plaintiff had conducted no pre-filing inquiry and concluded that "[p]erhaps" the plaintiff had filed the lawsuit for an improper reason. *Id.* at 1082. All of this caused Judge Cudahy to dissent on the ground that the approach used in the majority opinion "effectively transforms Rule 11 from a protector against frivolous litigation, a boon to the parties and the courts, into a fomentor of derivative litigation, a mire for unwary parties and overzealous courts." *Id.* at 1085.

The inconsistency in the way in which the different circuit courts of appeal treat the Rule 11 pre-filing inquiry requirement is troubling to litigators, who face a difficult enough problem anticipating the differing standards used by district court judges in evaluating the sufficiency of their efforts to investigate the merits of their clients' cases before they have had an opportunity to commence discovery. Attorneys in some circuits should not have to deal with the additional burden of appellate courts willing to twist the facts in order to impose sanctions.

The potential for abuse at the district-court level makes it imperative that these decisions be reviewed in a careful fashion. For that reason, Amicus believes that this Court should reject the deferential across-the-board abuse of discretion standard adopted

by some circuits. *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc); *O'Connell v. Champion Internat'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987); *EBI, Inc. v. Gator Industries, Inc.*, 807 F.2d 1, 6 (1st Cir. 1986); *Stevens v. Lawyers Mutual Liability Ins. Co.*, 789 F.2d 1056, 1060 (4th Cir. 1986); *Lieb v. Topstone Industries Inc.*, 788 F.2d 151, 157 (3d Cir. 1986); *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1887 (10th Cir. 1985). Amicus also urges this Court to reject the approach followed in other circuits, which apply an abuse of discretion standard of review on the issue of the adequacy of a pre-filing inquiry.[6] *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1175 (D.C.Cir. 1985); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 n.7 (2d Cir. 1985), *cert. denied*, ____ U.S. ____, 108 S.Ct. 269 (1987).[7]

Instead, this Court should adopt the analysis used by the Eighth and Ninth Circuits. *Kurkowski v. Volcker*, 819 F.2d 201, 203 n. 8 (8th Cir. 1987); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986). The *Zaldivar* opinion described that standard of review as follows (780 F.2d at 828):

> Appellate review of orders imposing sanctions under Rule 11 may require a number of separate inquiries. If the facts relied upon by the district court to establish a violation of the Rule are disputed on appeal, we review the factual determination of the district court under a clearly erroneous standard. If the legal conclusion of the district court that the facts constitute a violation of the Rule is disputed, we review that legal conclusion *de novo*. Finally, if the appropriateness of the sanction imposed is challenged,

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[6] This approach does have the advantage of reviewing the legal issue of the adequacy of a party's legal arguments on a *de novo* basis. See discussion *infra* at 8, n. 8.

[7] *De novo* review in this case could have affected the outcome on appeal. Amicus understands that Petitioner's Opening Brief will set forth facts not discussed in the opinions below, including its corroboration of the client's price-discrimination allegations through a deposition in a related case and the refusal of Respondents' General Counsel to discuss the proposed complaint in this case with Petitioner, even after having been provided a draft of that complaint.

we review the sanction under an abuse of discretion standard.

This three-tiered approach recognizes the different types of issues that may arise in a Rule 11 appeal, and applies traditional legal standards to the resolution of those issues. Where the underlying facts are in dispute, appellate courts should not reverse the district court's resolution of that controversy unless its decision was clearly erroneous. Rule 52(a), Fed.R.Civ.P.; *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). And where a party contends the district court erred in its choice of sanctions, appellate courts should apply the same abuse of discretion standard they apply to similar controversies. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

The second of these three issues – whether specific facts justify the imposition of sanctions – presents a mixed issue of law and fact. In particular, the court must reach a legal conclusion of the minimal requirements for an attorney's investigation of a particular case, given both the unique circumstances of that case and the legal tests of liability. The appellate court need not determine the credibility of witnesses or apply any of the usual burdens of persuasion in order to review the district court's determination on this issue. As a result, this question should be reviewed on a *de novo* basis.[8]

Where there exist factual disputes on which First Amendment rights turn, this Court applies a *de novo* standard of review in order to "make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)(quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). This standard is used in both defamation and employment cases. *Connick v. Myers*, 461 U.S. 138, 148 n. 7 (1983). Imposition of Rule 11 sanctions on both plaintiffs and their attorneys can chill the exercise of the First Amendment right of access to the courts[9] as effectively as defamation suits and disciplinary action by public employers can chill other forms of protected expression. A *de novo* standard of review is as necessary here as in these other settings.

In reviewing a district court's determination *not* to impose sanctions, an appellate court must be careful not to be more zealous in applying Rule 11 than was the district court. One of the purposes of appellate review of Rule 11 sanction motions is to ensure that a district court judge does not impose sanctions out of frustration with a protracted lawsuit in which the facts and/or the law predominate in favor of one party. An appellate court must make sure that the district court did not use hindsight logic in declaring that a losing party and/or attorney should have known from the outset that the case lacked any legal or factual basis.

Different considerations apply to a decision not to impose sanctions. That type of decision is unlikely to involve an emotional reaction by the district court to a difficult case. Under these circumstances, an appellate court should hesitate before substituting its legal judgment that a party or attorney had engaged in sanctionable behavior. It should never engage in speculation that a party may have acted improperly or a for a bad motive. *Szabo, supra.* Overly zealous appellate court review of a denial of sanctions undermines the underlying purpose of Rule 11 to punish clearly frivolous or abusive behavior, without at the same time chilling "an attorney's enthusiasm or creativity in pursuing factual or legal theories." Advisory Committee's Note, 97 F.R.D. at 199.[10]

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[8] This standard of review is even more crucial for a determination that an attorney submitted a pleading, motion or other paper that was not "warranted by existing law or a good faith argument for the extension, modification, or reversal of an existing law..." Rule 11, Fed.R.Civ.P. That issue involves purely legal issues, or nearly so. An appellate court is in the same position as a district court to test the adequacy of an attorney's or party's legal arguments.

[9] *Bounds v. Smith*, 430 U.S. 817, 828 (1977) characterized the right of access to the courts as a "fundamental constitutional right." *See also Boddie v. Connecticut*, 401 U.S. 371 (1971); *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361, 1364-69 (Colo. 1984) and decisions cited therein.

[10] It is appropriate for this Court to impose differential standards of review of decisions not to oppose sanctions as opposed to decisions to oppose Rule 11 sanctions. This Court has imposed differential standards of proof when necessary to effectuate important public policies. *See, e.g., Christiansburg Garment Co. v. EEOC*, 422 U.S. 405 (1975). Of course, this standard would apply both

II. ATTORNEY FEES FOR AN UNSUCCESSFUL RULE 11 APPEAL SHOULD BE AWARDED ONLY IF THE APPEAL ITSELF WAS FRIVOLOUS.

The court of appeals in the case concluded that Respondents were entitled to an award of attorney's fees on appeal, without a finding that the appeal itself was frivolous. *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 897 (D.C. Cir. 1989). The court relied on its earlier decision in *Westmoreland*, 770 F.2d at 1179, in which it had concluded that a party who successfully challenged a denial of sanctions was entitled to attorneys' fees on appeal as part of "the reasonable expenses incurred" as a result of the filing of a pleading, motion, or other paper in violation of Rule 11.

This precedent is an extremely dangerous one, and should be reversed by this Court. Imposition of Rule 11 sanctions on an attorney or a law firm inevitably will have a stigmatizing effect. It constitutes a judicial declaration that an attorney has engaged in extremely unprofessional conduct. Such a decision can be cited in later cases brought by the same attorney or firm, in an effort to obtain sanctions in another case or to engage in an *ad hominem* attack. These consequences can be as serious or more serious than the actual financial penalties.[11]

Because of the seriousness of Rule 11 sanctions, it is crucial that parties and their attorneys not be deterred from obtaining appellate review of such decisions. The court of appeals' decision will have precisely this effect. A party or attorney on whom sanctions have been imposed would have to weigh the possible additional penalties of paying not only for that party's or attorney's appeal, but also for the appellate attorneys' fees of opposing counsel. These potential additional penalties will create a powerful disincentive against appellate review, even in cases in which the sanctioned party or attorney has a legitimate argument that the district

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to plaintiffs and to defendants appealing a district court's decision not to impose sanctions. Cf. *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1162-63 (9th Cir. 1987).

[11] That is not to minimize the fiscal impact of a large Rule 11 award. In at least one case, fees and costs awarded under Rule 11 exceeded one million dollars. *Avirgan v. Hull*, 705 F.Supp. 1544 (S.D.Fla. 1989).

court erred in imposing sanctions in the first place.

The court of appeals' decision ignores the fundamental difference between the merits of a sanctioned party's action and the propriety of imposing those sanctions. Even where a claim is factually or legally weak, a party or attorney may be able to present persuasive arguments against the imposition of Rule 11 sanctions. That issue is separate from the legal and/or factual inadequacy of the document on which the sanctions were based. Just as Rule 11 is violated only when it is "patently clear that a claim has absolutely no chance of success," *Eastway Constr. Corp.*, 762 F.2d at 254, appellate attorneys' fees should be awarded in a Rule 11 dispute only if the appeal itself is frivolous.

Rule 38, Fed.R.App.P., provides an adequate remedy for frivolous appeals. The court of appeals' decision would render Rule 38 nugatory in appeals of Rule 11 sanction motions. Neither the language of Rule 11 nor the policy underlying that rule justifies carving out an exception to Rule 38 for this limited category of cases.

CONCLUSION

For the reasons stated herein, Amicus submits that this Court should adopt a three-tiered standard of appellate review in Rule 11 cases, in which appellate courts would determine on a *de novo* basis whether the facts of the case justify the imposition of sanctions. An appellate court must use particular caution in reviewing a decision not to impose sanctions, since those cases involve a far lower probability that the district court may have erred due to its frustration in having to deal with a difficult case. In addition, this Court should reverse that part of the court of appeals' decision which awarded appellate attorneys' fees without a finding that the appeal itself was frivolous.

Respectfully submitted,

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November 29, 1989